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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-34

COLIN F. BEATON AND ELEANOR M. BEATON,
APPELLANTS,

v.

JUDGES OF THE LAND COURT, ET AL.,
APPELLEES.

ON APPEAL FROM THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

MOTION TO DISMISS OR AFFIRM

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The Appellee Quinoil Industries, Inc. moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Judicial Court of Massachusetts on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

I.

The State Statute Involved and the Nature of the Case

A. The Statute

This appeal raises the question of the validity of St. 1943 Section 57 of the Laws of the Commonwealth of Massachusetts as amended by St. 1959 c. 105. This statute, as amended, establishes a proceeding by which a foreclosing mortgagee may meet the requirements of the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. App. § 532 (1970) (hereinafter "1940 Relief Act"). The statute permits a mortgagee who is seeking to foreclose a mortgage to file a bill to foreclose in the Land Court. The statute provides for notice under the 1940 Relief Act to be given specifically to the mortgagor, as well as general notice by publication. An amendment to this statute, St. 1959 c. 105, limits the proceeding in the Land Court under such a bill to foreclose solely to a consideration of the issues of the existence of persons entitled to the benefit of the 1940 Relief Act and their rights, if any. The amendment also provides that persons who are not entitled to the benefits of the 1940 Relief Act, or appearing on behalf of such persons, are not permitted to appear or be heard in such a proceeding.

B. The Proceedings Below

The Appellants (hereinafter "the Beatons"), husband and wife, own in fee as tenants by the entirety certain real estate in Bridgewater, Massachusetts. On October 10, 1966, the Beatons mortgaged the land to the appellee Quinoil Industries, Inc., then named Quincy Oil Co. (hereinafter "Quinoil"). The mortgage provided: "This mortgage is

upon the statutory condition . . . for any breach of which the mortgagee shall have the statutory power of sale."

On February 20, 1974, Quinoil filed a "Bill to Foreclose Mortgage" in the Land Court, under the procedure established by St. 1943, c. 57, as amended by St. 1959, c. 105. The Land Court then issued an order of notice which advised:

> "If you are entitled to the benefits of the Soldiers' and Sailors' Civil Relief Act of 1940 as amended and you object to such foreclosure you or your attorney should file a written appearance and answer in said court . . . or you may be forever barred from claiming that foreclosure is invalid under said act."

The Beatons were duly served with this notice. It is undisputed that the Beatons do *not* claim to be persons entitled to the protection of the 1940 Relief Act.

Nevertheless, the Beatons attempted to file their appearance and a purported answer with the Clerk of the Land Court. This answer did not raise any claim or issue under the 1940 Relief Act. It was not accepted for filing but was referred to the Judges of the Land Court, Appellees Randall and Sullivan (hereinafter "the Land Court Judges"). The Beatons also filed a motion that their purported answer be accepted for filing, which the Land Court Judges denied, relying on St. 1959, c. 105 which precluded the Beatons from appearing and filing the answer in the proceeding since their claims were unrelated to the 1940 Relief Act.

The Beatons then filed a Writ of Mandamus before a single Justice of the Supreme Judicial Court of Massachusetts seeking to compel the Land Court Judges to cause the purported answer to be accepted for filing and to adjudicate the issues raised in it. The Single Justice sustained demurrers to the petition for Writ of Mandamus,

and the Beatons appealed this decision to the Supreme Judicial Court. In an opinion entered April 10, 1975, the Supreme Judicial Court affirmed, stating that "[t]he appeal is utterly without merit." 1975 Mass. Adv. Sh. 1005, 326 N.E.2d 302. Moreover, finding the appeal "without merit and having accomplished no purpose except delay" it awarded appellees double costs of that appeal. *Id.* at 1019. The Beatons have appealed to this Court from that judgment.

A collateral case involving the Beatons and Quinoil is not directly before this Court for review but it is relevant. On September 12, 1973, the Beatons had filed in the Superior Court for Plymouth County, Massachusetts a Bill in Equity to redeem and discharge the mortgage in question. This action is still being prosecuted in the Plymouth Superior Court.

II.

Argument

The Case Presents No Substantial Question Not Previously Decided By This Court

Under the General Laws of the Commonwealth of Massachusetts, Mass. G.L. ch. 244, there are two methods for the foreclosure of mortgages after a breach of condition: by entry or action, Mass. G.L. ch. 244, §§ 1-10, and by sale under a power of sale, Mass. G.L. ch. 244, §§ 11-15. With respect to the Beatons' mortgage Quinoil was following procedures for foreclosure under the statutory power of sale. A brief summary of this procedure will help to clarify the nature of the Land Court proceedings in which the Beatons contend they were unconstitutionally prevented from appearing and answering.

Foreclosure under a power of sale is a nonjudicial procedure in that it can be accomplished without bringing an action in any court. Mass. G.L. ch. 244, §§ 11-15. To foreclose, a mortgagee must, *inter alia*, publish notice of the forthcoming foreclosure sale once a week for three successive weeks in a newspaper in the town in which the land lies. Mass. G.L. ch. 244, § 14. The sale may then take place, and if otherwise properly conducted, the sale effectively forecloses the mortgage. Mass. G.L. ch. 244, § 14.

Statute 1943, c. 57, as amended, gives a mortgagee a procedure, in addition to those nonjudicial procedures necessary for a valid foreclosure, by which the mortgagee can avoid any cloud on the title which might result from an interested party having been in, or just released from, military service and thus within the aegis of the 1940 Relief Act. *See Lynn Institution for Savings* v. *Taff*, 314 Mass. 380, 386, 50 N.E.2d 203 (1943). Failure to comply with the 1940 Relief Act does not invalidate the foreclosure sale as to anyone not entitled to the benefits of that Act. *Guleserian* v. *Pilgrim Trust Co.*, 331 Mass. 431, 433-34, 120 N.E.2d 193 (1954).

The Beatons contend that not allowing them to answer in the Land Court proceeding deprived them of substantial property rights without due process of law (Jurisdictional Statement at 10). This claim, it appears, rests on two arguments: the Beatons contend that the Land Court in the proceeding under Stat. 1943, section 57, as amended, adjudicates the question whether there has in fact been a default of the mortgage (Jurisdictional Statement at 13), and in addition they may be contending that if they are not allowed to answer in the Land Court proceeding the mortgage may be foreclosed without any prior judicial hearing in which they may contest the alleged breach of condition (*Id.* at 15). Neither argument is substantial.

Both the amendment to the Statute, Stat. 1959, c. 105 and the opinion of the Supreme Judicial Court, 1975 Mass. Adv. Sh. at 1011-13; 326 N.E. 2d at 305-306, make it clear that the only issues to be raised in the Land Court proceeding are those related to the 1940 Relief Act.

The Land Court proceeding, to be sure, was initiated by a "Bill to Foreclose," which has language, *inter alia,* to the effect that a breach of condition of the mortgage exists, and the decrees issued in such a proceeding generally would speak in terms of "authorizing" and "approving" the foreclosure sale. The use of this language, however, does not mean that as a substantive matter the Land Court proceeding involves, or is capable of involving, any substantial property interest of the Beatons. Because of the statutory limitation on the Land Court's power in such a proceeding, it is clear that despite the Beatons' contentions to the contrary (Jurisdictional Statement at 13) and regardless of the particular language used in the formal documents involved in the proceeding, there can be no adjudication by the Land Court in such a proceeding as to whether there has been a breach of condition of the mortgage, or indeed as to any factual or legal issue not related to the 1940 Relief Act. Moreover, since persons asserting no claim under the 1940 Relief Act are precluded from appearing in such proceedings, there is no collateral estoppel or res judicata effect as to any factual determination made in such proceedings except those determinations, if any, related to the 1940 Relief Act (which the Beatons have not contested).

After the Land Court proceeding, therefore, there is no right or claim which the Beatons might have asserted before the proceeding which they are foreclosed from exercising or asserting afterwards except their rights, either nonexistent or knowingly waived, under the 1940 Relief Act. The Land Court proceeding thus leaves the

Beatons in exactly the same condition vis-a-vis their property as they were in before the proceeding. It in no way deprives the Beatons of any substantial interest in their property, and refusing to allow them to appear in the proceeding thus cannot constitute a deprivation of property without due process of law, *Perry* v. *Sinderman,* 408 U.S. 593 (1972).

A somewhat more general, although equally unsupportable, argument appears to underlie the Beatons' claim. This appears to be that somehow the Beatons must be allowed to appear in the Land Court proceeding in order to assure that they have an opportunity for a judicial hearing, prior to the sale, on the contentions on which they wish to contest the foreclosure. As an initial matter, even assuming that they have a right to such a prior hearing, there is no reason why it should be compelled as a part of the Land Court proceeding. The jurisdiction of the Land Court in such a proceeding has been clearly circumscribed by statute, and even if there were a constitutional requirement that the Beatons be afforded a prior hearing, such a requirement could be met by a hearing in any other legitimate forum. *Lindsey* v. *Normet,* 405 U.S. 56 (1972); *Bianchi* v. *Morales,* 262 U.S. 170 (1923) (Holmes, J.); *Grant Timber & Mfg. Co.* v. *Gray,* 236 U.S. 133 (1915) (Holmes, J.). The Beatons err in suggesting that because the Land Court is empowered to adjudicate certain extremely limited issues as to mortgage foreclosure it must as a constitutional matter be empowered to adjudicate every issue which the Beatons seek to raise.

In fact the Beatons *are* accorded an opportunity to raise those issues which they seek to raise and they are accorded such an opportunity in a forum and pursuant to a procedure which clearly meets all the requirements of due process of law. There can be no possibility of constitutional infirmity in denying the Beatons an opportunity

to contest an issue in one forum if they are clearly given the opportunity to raise and contest the issue in another forum. *Lindsey* v. *Normet, supra.*

The due process clause requires, with respect to state action amounting to a deprivation of any substantial interest in property, that the person whose interest is affected be accorded an opportunity for a hearing, after due notice, at some time prior to the deprivation. *Fuentes* v. *Shevin,* 407 U.S. 67 (1972). The foreclosure by sale does not appear to involve significant state action, but in any case the Beatons obviously had prior notice of the prospective foreclosure. Indeed, the opinion of the Supreme Judicial Court makes it clear that it would be extremely unlikely that any mortgagor would not receive adequate notice of a mortgage foreclosure, 1975 Mass. Adv. Sh. at 1017-18; 326 N.E. 2d at 307. The particular statute attacked here, moreover, provides for specific notice of the prospective foreclosure to the mortgagor, as well as notice by publication. Thus, the Beatons received, and were virtually assured of, prior notice of the foreclosure by sale.

Even though the foreclosure was a nonjudicial one, and thus cannot be considered state action, the Beatons then had an opportunity for a judicial hearing of their claim prior to the foreclosure. A mortgagor who wishes to oppose foreclosure by sale may initiate a civil action to enjoin the foreclosure and to obtain an accounting. *Newman* v. *Greenberg,* 1972 Mass. Adv. Sh. 771, 281 N.E. 2d 590; see Mass. G.L. ch. 244, § 22. Claims that a breach of condition has not occurred may be raised and adjudicated in such an action brought to restrain the foreclosure. *Boyajian* v. *Hart,* 284 Mass. 557 (1933); *McCombs* v. *Elmes,* 197 Mass. 19 (1907). In fact, the opinion of the Supreme Judicial Court in this case stated unequivocally that there would be no obstacle to the Beatons seeking an injunction against the foreclosure sale as a part of their ongoing related

action against Quinoil in the Plymouth Superior Court. 1795 Mass. Adv. Sh. at 1019; 326 N.E. 2d at 306-307. There is no constitutional infirmity in requiring a party to initiate an action to assert its claims against a potential deprivation of property. *Lindsey* v. *Normet, supra.*

Thus, the Beatons' only complaint must be that the type of hearing available to them if they chose to contest the foreclosure in the Superior Court would be inadequate to protect their rights. The Plymouth Superior Court has jurisdiction to issue a temporary restraining order and preliminary injunction, Mass. R. Civ. P. 65, and there is no reason why the Beatons could not have had a judicial hearing on a motion for a preliminary injunction prior to the foreclosure if they had only applied for one. To be sure, if after this hearing a preliminary injunction were denied, the trial of the Beatons' claims might not take place until after the foreclosure sale, but such delay would only occur if the court determined that the Beatons' claims did not warrant interlocutory relief.

The Beatons contend that such an opportunity for a prior hearing is constitutionally inadequate because the Superior Court would have discretion not to enjoin the foreclosure sale (Jurisdictional Statement at 15). It is illogical to equate, as the Beatons do, an absolute denial of a hearing with discretion not to accord the relief sought. Moreover, this Court has made it clear in *Yakus* v. *United States,* 321 U.S. 414 (1944), upon which the Beatons rely (*Id.* at 15), that even where there is no opportunity for interlocutory judicial intervention and where the only forum in which relief from a governmental order affecting substantial property interests is an administrative agency with "wide scope for the exercise of . . . discretionary power" there is no denial of due process. *Id.* at 439.

Even more critically, the Beatons made no attempt prior to the decision here appealed from to apply to the Plymouth

Superior Court for interlocutory relief from the proposed foreclosure sale. They therefore have no standing to assert in this proceeding that such an attempt would have been futile, and their assertion that any hearing on such application would be constitutionally infirm is premature, unsupportable and not properly before the Court in this proceeding.

The Beatons were therefore not deprived of any substantial interest in property by the Land Court proceedings, and their assertions that they have been denied due process by being excluded from such proceedings are completely without merit.

III.

Conclusion

Wherefore, Appellee Quinoil Industries, Inc., respectfully submits that the questions upon which this cause depend are so unsubstantial as not to need further argument, and Appellee respectfully moves the Court to dismiss this appeal or, in the alternative, to affirm the judgment entered in the cause by the Supreme Judicial Court of Massachusetts.

Respectfully submitted,

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